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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE TESLA, INC. SECURITIES
LITIGATION

Case No. 3:18-cv-04865-EMC

**LEAD PLAINTIFF'S NOTICE OF
MOTION AND MOTION FOR CLASS
CERTIFICATION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

ORAL ARGUMENT REQUESTED

Date: February 18, 2021

Time: 1:30 p.m.

Location: Courtroom 5, 17th Floor

Judge: Hon. Edward Chen

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on February 18, 2021 at 1:30 p.m., or as soon thereafter as this matter may be heard, in Courtroom 5 – 17th Floor of the United States Courthouse located at 450 Golden Gate Avenue, San Francisco, CA 94102, the Honorable Edward M. Chen presiding, Lead Plaintiff Glen Littleton, by his counsel, will move, and hereby does move, this Court for an entry of an Order in the above-captioned action: (i) certifying pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure Lead Plaintiff’s proposed Class (defined below) of all individuals and entities who purchased or sold Tesla stock, options, and other securities during the Class Period (defined below), and were damaged thereby; (ii) appointing Littleton as Class Representative; and (iii) appointing Levi & Korsinsky, LLP as Class Counsel.

PLEASE TAKE FURTHER NOTICE that this motion is based on the Memorandum of Points and Authorities below, the Declarations of Nicholas I. Porritt, Dr. Michael L. Hartzmark, Ph.D., and Lead Plaintiff Glen Littleton, and the exhibits attached thereto, the arguments of counsel, and any other matters properly before this Court. A proposed form of Order is also submitted herewith.

ISSUES TO BE DECIDED

1. Whether to certify the proposed Class (defined below) because it satisfies all the requirements of Rules 23(a) and 23(b)(3);
2. Whether to appoint Littleton as Class Representative; and
3. Whether to appoint Levi & Korsinsky as Class Counsel.

MEMORANDUM OF POINTS AND AUTHORITIES

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1 **I. PRELIMINARY STATEMENT**

2 This is a securities class action arising from statements by Defendants Elon Musk and
 3 Tesla, Inc. from August 7, 2018 to August 17, 2018 regarding a potential transaction where Tesla
 4 would go private at a price of \$420 per share. These statements caused Tesla's stock to trade at
 5 inflated prices and distorted the prices of Tesla options until the truth that the proposed transaction
 6 was illusory was finally revealed in a *New York Times* interview with Musk published on August
 7 17, 2018. Lead Plaintiff, Glen Littleton, purchased stock and traded options from August 7, 2018
 8 to August 17, 2018 and suffered significant damages as a result of Defendants'
 9 misrepresentations. He seeks to recover these losses as well as the losses suffered by all other
 10 Tesla investors who were similarly harmed. This Court has already held that Littleton's
 11 Consolidated Complaint for Violations of the Federal Securities Laws dated January 16, 2019
 12 (ECF No. 184) ("Complaint"), adequately pleads claims for violations of Sections 10(b) and 20(a)
 13 of the Securities Exchange Act of 1934, 15 U.S.C. §§78j(b) and 78t(a) against Tesla, Elon Musk,
 14 and the other Defendants. This Court should also certify the proposed class.

15 The Supreme Court and the Ninth Circuit have recognized that securities claims are
 16 particularly suited to treatment as class actions. The majority of the issues in this litigation, such
 17 as whether any Defendant made a misrepresentation, whether the misrepresentation was material,
 18 whether the misrepresentation was made knowingly or with deliberate recklessness, and whether
 19 individual Defendants controlled any maker of a misrepresentation, are identical for every
 20 member of the proposed class and are subject to common proof and determination. Other elements
 21 of the claims alleged in the Complaint, such as reliance and loss causation, are also subject here
 22 to common class-wide proof because Tesla common stock and options traded in efficient markets
 23 so that their prices quickly reflected any misrepresentation by Defendants. Indeed, the analysis
 24 by Littleton's expert, Dr. Michael Hartzmark, shows that Elon Musk's initial misrepresentation
 25 about taking Tesla private, published at 12:48 p.m. EDT on August 7, 2018, led to an almost
 26 instantaneous increase in Tesla's stock price, which increased from \$356.85 at 12:47 p.m. EDT
 27 to close on August 7, 2018 at \$379.57. Indeed, the reaction of Tesla's stock price to Elon Musk's
 28 statements was so dramatic that trading of its stock on the NASDAQ exchange was halted during

the afternoon of August 7, 2018 for almost ninety minutes. Dr. Hartzmark’s analysis shows similar reactions in the prices for Tesla options as well. Other metrics used by the courts to assess the efficiency of a market for a security also strongly support the efficiency of the market for Tesla securities.

Where a security trades in an efficient market that rapidly incorporates public information about the security, including false or misleading information, reliance by investors on the misrepresentations is presumed and the measurable impact of misrepresentations on the prices for securities also shows loss causation. Thus, the only remaining issue that is not subject to common class-wide proof is the amount of damages recoverable by each individual class member. This factor, however, is no barrier to class certification especially where, as is the case here, calculation of damages is largely a mechanical calculation following a common methodology as described by Dr. Hartzmark.

Accordingly, Littleton’s motion for class certification should be granted, Littleton should be appointed as class representative, and Levi & Korsinsky, LLP should be appointed as class counsel.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Musk Announces That He “Secured” Funding to Take Tesla Private at \$420 Per Share and Investor Support is “Confirmed”.

On August 7, 2018, at 12:48 p.m. EDT, Tesla’s Chairman and Chief Executive Officer, Elon Musk, tweeted the following message to over 22 million people: “Am considering taking Tesla private at \$420. Funding secured.” ¶74.¹ During the afternoon of August 7, 2018, Musk continued to make public statements about his proposed transaction both on his personal Twitter account and on a Tesla blog. ¶¶83-85. In these statements, Musk stated that even though “a final decision has not yet been made” Tesla will go private “if the process ends the way I expect it

¹ Citations to “¶__” refer to paragraphs in the Complaint and the corresponding paragraph in Defendants’ Answer to the Consolidated Complaint for Violations of the Federal Securities Laws (ECF No. 264) (“Answer”). “In reviewing a motion for class certification, the court generally is bound to take the substantive allegations of the complaint as true,” as the only question is “whether the requirements of Rule 23 have been met.” *In re UTStarCom, Inc., Sec. Litig.*, No. 04-cv-04908-JW, 2010 WL 1945737, at *3 (N.D. Cal. May 12, 2010).

1 will.” ¶84. Finally, at 3:36 p.m. EDT, Musk tweeted “Investor support is confirmed. Only reason
2 why this is not certain is that it’s contingent on a shareholder vote.” ¶85.

3 The market immediately reacted to Musk’s statements on August 7, 2018, believing that
4 he had “secured” funding and would be imminently taking Tesla private at \$420 per share, that
5 the “funding” for this going-private transaction was already “secured,” that Musk had already
6 “confirmed” “investor support” for this transaction, and that the transaction was only “contingent
7 on a shareholder vote.” The impression that a going-private transaction was imminent and its
8 funding was “secured” was confirmed by Martin Viecha, Tesla’s Senior Director of Investor
9 Relations, who, in response to questions from financial analysts about funding, stated that “the
10 first Tweet clearly stated that ‘financing is secured’. *Yes, there is a firm offer*” and “I only want
11 to stress that Elon’s first tweet, which mentioned ‘financing secured’ *is correct*.” ¶¶87-88
12 (emphasis added). Later that evening Viecha elaborated further advising an analyst: “The very
13 first tweet simply mentioned ‘Funding secured’ which means there is a firm offer.” ¶89. When
14 pressed if this meant there was a commitment letter, Viechia responded “*given we went full-on*
15 *public with this, the offer is as firm as it gets*.” *Id.* (emphasis added).

16 In analyst reports issued on August 7, 2018 and August 8, 2018, financial analysts
17 confirmed that the public believed that financing was secured. RBC Capital Markets wrote that
18 “we believe there is substance to the news and note that prior ‘controversial’ shareholder votes
19 (like Solar City) have always voted with Elon. . . . Elon’s tone and messaging regarding a potential
20 transaction lead us to believe that there could be significant outside funding lined up.” ¶90. JP
21 Morgan raised its target price for Tesla stock to reflect the potential transaction noting that “they
22 are nevertheless declarative statements from the CEO of a public company which we feel should
23 be considered seriously. Either funding is secured or it is not secured, and Tesla’s CEO says
24 funding is secured. . . . To us, this suggests more than mere consideration – Mr. Musk expects
25 Tesla will go private.” ¶96. Evercore, while recognizing that some details were missing and there
26 was still some uncertainty surrounding the proposed transaction, noted that it believed “Musk’s
27 intent is serious and genuine” and that “Funding secured’ should be interpreted as “a strong verbal
28 commitment, with funds available and parties willing to execute quickly.” ¶97. It also opined that

1 by August 8, 2018, the market had accepted that funding was secured and a going-private
2 transaction could be completed by Tesla and Musk. *Id.*

3 News reporting about the proposed transaction was widespread over the following week.
4 On August 8, 2018, the Tesla Board issued a statement that confirmed Musk had made a proposal
5 to them. ¶93. After the market closed on August 8, 2018, the *Wall Street Journal* reported that the
6 SEC had commenced an investigation into whether Musk had “a factual basis” for his August 7,
7 2018 tweets. ¶98. On August 12, 2018, *Bloomberg* reported that the Saudi Arabian Public
8 Investment Fund, identified as a potential source of funding for the proposed transaction, “hasn’t
9 made any firm decisions on whether to increase its stake [in Tesla], or by how much.” ¶102.

10 On August 13, 2018, Musk published a lengthy post regarding the potential transaction on
11 Tesla’s blog where he sought to bolster his prior assertion that funding was secured for taking
12 Tesla private and how he intended to structure the transaction. ¶103. Musk also stated he had
13 engaged advisors, later identifying them as Silver Lake and Goldman Sachs. ¶¶103-04. Analysts
14 were again persuaded that the proposed transaction was likely, with Morningstar stating that “our
15 impression of his words is that he thinks it can happen, and we agree.... we think a deal will not
16 happen this week but will eventually be announced,” and stating their belief that “a deal, if
17 announced, would be approved.” ¶105. On August 14, 2018, however, *Bloomberg* reported that,
18 contrary to Musk’s statement the day before, neither Silver Lake nor Goldman Sachs had been
19 engaged by Musk or Tesla. ¶107. On August 15, 2018, it was reported that the SEC had issued
20 formal subpoenas relating to Musk’s tweets on August 7, 2018. ¶109. After market hours on
21 August 16, 2018, the *New York Times* published online, and later in print on August 17, 2018, a
22 detailed interview with Musk confirming that funding for the proposed transaction “was far from
23 secure” and the PIF “had not committed to provide any cash.” ¶112. Also on August 16, 2018,
24 the *Wall Street Journal* reported after market hours that the SEC’s investigation into Musk was
25 over whether he “intentionally misled investors when he tweeted about the proposal in a bid to
26 hurt short-sellers by driving up Tesla’s stock price.” ¶111. On August 24, 2018, Elon Musk and
27 Tesla confirmed that they were no longer pursuing a going-private transaction. ¶ 115.

28 As alleged in the Complaint, Elon Musk has since admitted that there was never any

1 funding. ¶¶170-71. Further, investors with whom Elon Musk discussed the possibility of a
 2 transaction actually opposed rather than supported it, no material terms had been proposed or
 3 agreed with Tesla’s Board of Directors, investors, or potential sources of funding, and no financial
 4 or legal advisors had been engaged. ¶173. Ultimately, both Elon Musk and Tesla consented to
 5 judgments being entered against them in cases brought by the SEC. ¶116.

6 **B. Defendants’ Misrepresentations Artificially Inflate Tesla’s Stock Price and**
 7 **Distort Its Option Prices.**

8 Tesla’s stock is listed on the NASDAQ Global Select market under the ticker symbol
 9 “TSLA.” Other Tesla securities include stock options which are traded and quoted on exchanges
 10 including: BOX Exchange LLC; Cboe BZX Options Exchange, Inc; Cboe C2 Options Exchange,
 11 Incorporated; Cboe EDGX Options Exchange, Inc.; Cboe Options Exchange, Incorporated;
 12 Miami International Securities Exchange, LLC; MIAX PEARL, LLC; Nasdaq BX, Inc.; Nasdaq
 13 GEMX, LLC; Nasdaq ISE, LLC; Nasdaq PHLX LLC; The Nasdaq Stock Market LLC; NYSE
 14 American LLC; and NYSE Arca, Inc. ¶16. At or around August 7, 2018, Tesla had over 170
 15 million shares outstanding. ¶30. The “short interest” at that point in time was 33.8 million,
 16 meaning that almost 20% of Tesla’s shareholders were betting that Tesla’s stock would decline
 17 in value. ¶7.

18 Elon Musk’s tweets on August 7, 2018 had an immediate impact on the price of Tesla’s
 19 common stock. Littleton’s expert, Dr. Hartzmark, explains in his report with “99% confidence”
 20 that Musk’s initial tweet on August 7 caused a 2.29% increase in Tesla’s stock price within the
 21 first minute of trading (*i.e.*, 12:48 p.m. to 12:49 p.m.). Expert Report of Michael L. Hartzmark,
 22 Ph.D., attached as Exhibit A to the Declaration of Michael L. Hartzmark, Ph.D. (“Hartzmark
 23 Report”) at ¶75 n.117. Tesla’s stock price continued to climb as Musk continued to assure the
 24 public of the imminent going-private transaction, ultimately increasing \$22.72 per share to close
 25 at \$379.57 compared to Tesla’s price per share immediately preceding the tweet. *Id.* at ¶75. The
 26 trading volume in Tesla stock also spiked, increasing to over 18 million shares prior to close or
 27 more than double the average daily volume. *Id.* This volume, of course, also included “short”
 28 investors purchasing shares to “cover” or “close” their pre-existing positions in response to the

1 sudden and dramatic increase in Tesla's stock price. *See id.* at ¶45 & Exhibit VII.

2 Elon Musk's tweets also distorted option prices. Because he announced a proposed price
3 of \$420 for taking Tesla private, it immediately rendered many put options worthless as Tesla
4 stock would no longer have a chance to trade anywhere near their strike prices. *Id.* at ¶¶141-42.
5 Similarly, although an increase in stock price usually also increases the price of call options on
6 that stock, due to the effective price cap, call options on Tesla stock priced near or above the
7 proposed transaction price of \$420 declined in value as they would not come into the money,
8 including the cost of the options themselves. *Id.*

9 **C. Procedural History.**

10 Investors filed a securities class action complaint on August 10, 2018 following Elon
11 Musk's tweets. Several additional suits were filed over the next few weeks, ultimately being
12 consolidated into the above-captioned case when this Court appointed Littleton as the lead
13 plaintiff on November 27, 2018. ECF No. 152. Littleton filed the Complaint on January 16, 2019.
14 ECF No. 184. On April 15, 2020, the Court denied Defendants' motion to dismiss the Complaint.
15 ECF No. 251. Importantly, the Court held that Littleton "adequately pleaded falsity in the August
16 7, 2018 tweets" and the "August 13, 2018 tweet," namely because the well-pleaded factual
17 allegations demonstrated that Musk and Tesla "had not, in fact, secured funding for the
18 transaction" and that Musk "had not engaged Silver Lake or Goldman Sachs as the time of his
19 twitter post." *Id.* at 22, 25. The Court also held that Littleton sufficiently pleaded scienter based
20 on Musk's direct involvement in the various conversations prior to, during, and after the tweets.
21 *Id.* at 31-32. Finally, the Court rejected Defendants' arguments on loss causation, holding that
22 Littleton adequately alleged that Musk's and Tesla's misrepresentations proximately caused
23 damages for both "Short-selling Investors" and "Long-selling Investors." *Id.* at 37-40. The parties
24 are presently in discovery.

III. THE PROPOSED CLASS

Littleton moves to certify the following class of Tesla investors:

All individuals and entities who purchased or sold Tesla stock, options, and other securities from 12:48 p.m. EDT on August 7, 2018 to August 17, 2018 (the “Class Period”), and were damaged thereby (the “Class”). Excluded from the Class are: Defendants; the officers and directors of Tesla, Inc., at all relevant times; members of their immediate families and their legal representatives, heirs, successors or assigns; and any entity in which Defendants have or had a controlling interest.

Class members who do not have recoverable damages as a result of the alleged fraud would not be eligible to participate in any recovery.

IV. THE PROPOSED CLASS REPRESENTATIVE

Glen Littleton is the proposed Class Representative. He is a sophisticated investor having formerly traded and acted as a market maker on the Kansas City Board of Trade as well as trading on the Chicago Mercantile Exchange. Declaration of Lead Plaintiff Glen Littleton, ¶7. He holds a Bachelor of Arts degree in finance from Washington State University. *Id.* at ¶2. He has traded Tesla securities since 2015 and has been consistently bullish, or long, on Tesla, expecting that its stock price would appreciate over time. *Id.* at ¶¶11. Littleton has, however, also consistently hedged his long exposure to Tesla, recognizing the volatility in its stock price largely caused by the public statements made by Elon Musk. *Id.* at ¶¶11, 13.

Therefore, on August 6, 2018, Littleton had a portfolio of Tesla options consisting of call options² that would generally profit as Tesla’s stock prices increased. *Id.* at ¶13 & Exhibit A. Littleton also had positions in put options³ designed to offer protection if Tesla’s stock price unexpectedly declined. *Id.* Littleton follows Elon Musk on twitter and saw the tweet when it was posted at 12:48 p.m. EDT on August 7, 2018. *Id.* at ¶14. Littleton quickly realized that the tweet would have a severe adverse effect on his portfolio, especially his put options which would likely become worthless very quickly. *Id.* Believing that Elon Musk and Tesla would follow through on

² A call option is the right to purchase a security from the counterparty at a set price, the “strike price”, on a certain date in the future. ¶205.

³ A put option is the right to sell a security to the counterparty at a strike price on a certain date in the future. ¶206.

1 the announced plan to go private, Littleton proceeded to liquidate his portfolio over the next few
 2 days and established a new position with the assumption that Tesla would go private at around
 3 \$420 per share. *Id.* at ¶15. To execute this strategy, Littleton bought 100 shares of Tesla common
 4 stock and bought and sold put and call options from August 7, 2018 to August 16, 2018. *Id.* at
 5 ¶15 & Exhibit B. Following the publication of the *New York Times* article on August 17, 2018,
 6 Littleton was forced to liquidate his portfolio again. *Id.* at ¶16. Littleton then maintained a small
 7 position in Tesla until September 12, 2018 when he sold and/or closed his entire position in Tesla
 8 securities. *Id.* at ¶17. He recently began reinvesting in Tesla again in December 2019. *Id.* at ¶18.

9 Since his appointment as Lead Plaintiff, Littleton has faithfully carried out his fiduciary
 10 obligations. He regularly communicates with his attorneys, reviews pleadings and motion papers,
 11 and participates in discovery. *Id.* at ¶22. He has searched for and assisted in the production of
 12 more than 1,500 pages of documents in response to Defendants' initial requests for production.
 13 *Id.* To date, Littleton has spent between 50 hours and 75 hours participating in the litigation. *Id.*
 14 Littleton stands ready, willing, and able to oversee this litigation and zealously protect the
 15 interests of the Class as the court-approved Class representative until the conclusion of this action.
 16 *Id.* at ¶24.

17 **V. THE COURT SHOULD CERTIFY THE CLASS ACTION WITH LITTLETON AS**
 18 **CLASS REPRESENTATIVE AND LEVI & KORSINSKY AS CLASS COUNSEL.**

19 **A. The Standard on a Motion for Class Certification Favors Class Certification**

20 Both the Supreme Court and the Ninth Circuit have repeatedly recognized that private
 21 securities class actions are an important enforcement mechanism to supplement governmental
 22 regulation of the securities markets. *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551
 23 U.S. 308, 313 (2007) ("This Court has long recognized that meritorious private actions to enforce
 24 federal antifraud securities laws are an essential supplement to criminal prosecutions and civil
 25 enforcement actions."); *Berner v. Lazzaro*, 730 F.2d 1319, 1322-23 (9th Cir. 1984) ("[P]rivate
 26 actions brought by investors have long been viewed as a necessary supplement to SEC
 27 enforcement actions."), *aff'd*, 472 U.S. 299 (1985). Indeed, "class actions commonly arise in
 28 securities fraud cases as the claims of separate investors are often too small to justify individual

lawsuits, making class actions the only efficient deterrent against securities fraud.” *In re Adobe Sys., Inc. Sec. Litig.*, 139 F.R.D. 150, 152 (N.D. Cal. 1991). Accordingly, in securities actions like this one, Rule 23 fits “like a glove.” *Epstein v. MCA, Inc.*, 50 F.3d 644, 668 (9th Cir. 1995).

“Certification under Rule 23(b)(3) is a two-step process. Littleton must first show that the four prerequisites of Rule 23(a) are met: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” *SEB Inv. Mgmt. AB v. Symantec Corp.*, 335 F.R.D. 276, 282 (N.D. Cal. 2020); *see also Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 n.4 (9th Cir. 2013). “For a damages class under Rule 23(b)(3), plaintiff must next establish ‘that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.’” *Id.* The Supreme Court has cautioned that “Rule 23 grants courts no license to engage in free-ranging merits inquiries” *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 568 U.S. 455, 466 (2013); *see also In re Lendingclub Sec. Litig.*, 282 F. Supp. 3d 1171, 1178 (N.D. Cal. 2017) (Merits questions may only be considered to the extent relevant to “determining whether the Rule 23 prerequisites for class certification are satisfied.”). Thus, Littleton “need not make a prima facie showing that he or she will prevail on the merits.” *In re THQ Inc. Sec. Litig.*, No. 00-cv-01783-JFW-EX, 2002 WL 1832145, at *2 (C.D. Cal. Mar. 22, 2002).

As discussed below, the requirements of Federal Rule 23 are readily satisfied here.⁴

B. Littleton’s Claims are Typical of the Class under Rule 23(a)(3).

Under Rule 23(a)(3)’s “permissive standards” for typicality, “representative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.” *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014); *Symantec Corp.*,

⁴ The parties agree that the requirements of Rule 23(a)(1) and 23(a)(2) are satisfied by the proposed class in this case. *See Stipulation and Order as Modified Re: Plaintiff’s Motion for Class Certification* dated September 21, 2020. ECF No. 288.

335 F.R.D. at 283. Typicality is satisfied when “the claims of the class representatives are typical of those of the class, and is satisfied when each class member’s claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant’s liability.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (citation omitted). Under the rule’s permissive standards, representative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.” *LendingClub*, 282 F. Supp. 3d at 1179 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). Accordingly, differences in the amount of damages, the size or manner of purchase or holding, and the nature of the purchase or holding are insufficient to defeat class certification.

Littleton’s purchases and sales during the Class Period are typical of other Class members and he relies on the same legal theory: that Elon Musk and Tesla’s misrepresentations during the Class period inflated its stock price and distorted the price of options. The fact that Littleton traded predominately options rather than common stock does not preclude class certification. *See In re LDK Solar Sec. Litig.*, 255 F.R.D. 519, 532-33 (N.D. Cal. 2009) (finding that trader using “risky” margin and option trades was an adequate and typical class representative as the “mere fact that plaintiff may have suffered even greater financial losses than other class members in response to a particular change in the stock’s price does not render his interests adverse to the remainder of the class” and noting “there is nothing excessively ‘risky’ or troubling *per se* about the use of options”); *Schaefer v. Overland Express Family of Funds*, 169 F.R.D. 124, 129 (S.D. Cal. 1996) (“differences in the amount of damages, the size or manner of purchase, the nature of the purchase, and even the specific document influencing the purchase will not render a claim atypical in most securities cases” (internal quotation omitted)). This conclusion is not changed by the fact that Littleton, although holding an overall long position on Tesla during the Class Period, also hedged this position using options that would generate some profits on an unexpected stock price decline. *See Crossen v. CV Therapeutics*, No. C 03-03709 SI, 2005 WL 1910928, at *5 (N.D. Cal. Aug. 10, 2005) (investor who hedged his long position using options was still a typical and adequate class representative).

1 **C. Littleton Satisfies the Adequacy Requirement of Rule 23(a)(4)**

2 In determining whether a class representative can fairly and adequately protect the class
3 under Rule 23(a)(4), courts assess whether he/she (i) will, together with counsel, prosecute the
4 action vigorously on behalf of the class; and (ii) has any interests that conflict with, or are
5 antagonistic to, those of the putative class members. *Symantec Corp.*, 335 F.R.D. at 282 (quoting
6 *Hanlon*, 150 F.3d at 1020). Here, both requirements are satisfied.

7 As demonstrated by his vigorous prosecution of this action to date and summarized in his
8 declaration, Littleton readily satisfies the adequacy requirement. Littleton Decl. at ¶¶21-25. *Local*
9 *Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162
10 (9th Cir. 2001) (“The record indicates clearly that [lead plaintiff] understands his duties and is
11 currently willing and able to perform them. The Rule does not require more.”). Specifically,
12 Littleton has supervised and monitored the progress of this litigation and actively participated in
13 the case, including reviewing pleadings and motions submitted in this matter, reviewing and
14 responding to discovery requests, and producing documents in discovery. Further, Littleton has,
15 among other things, filed a detailed Complaint, and has vigorously pursued fact discovery,
16 including propounding document requests. *Id.* Littleton continues to supervise, monitor, and
17 participate in the ongoing prosecution of this action and will represent the interests of the Class.
18 *Id.*

19 Littleton also meets the second requirement of Rule 23(a)(4), which asks whether “the
20 named plaintiffs and their counsel have any conflicts of interest with other class members”
21 *Symantec Corp.*, 335 F.R.D. at 284-85. Littleton has no conflict of interest with other Class
22 members – on the contrary, his claims arise from the same set of facts as other class members.
23 Littleton’s own trades in Tesla securities during the Class Period cover a broad range of the
24 prospective Class members in this action, specifically investors that purchased Tesla’s common
25 stock at artificially inflated prices and purchasers and sellers of Tesla’s options at artificial prices
26 during the Class Period. In fact, this was one of the very reasons cited by this Court in its order
27 appointing Littleton as the lead plaintiff. *See* ECF No. 152 at 7 (“Second, Mr. Littleton held
28 interests that cover most of the persons/entities likely to be in the class – *i.e.*, long positions in

common stock, long positions in options, and short positions in options – and thus can most adequately represent the class[.]”). Thus, Littleton’s interests are well aligned with those of the Class in proving Defendants’ liability and maximizing the recovery of damages. In the context of securities class actions, courts have consistently found that class representatives that assert claims-based on facts similar to those of the absent class members meet the “comparable interest” standard and satisfy Rule 23(a)(4). *See, e.g., In re VeriSign, Inc. Sec. Litig.*, No. 02-cv-02270-JW, 2005 WL 7877645, at *8 (N.D. Cal. Jan. 13, 2005) (“The Lead Plaintiffs’ claims and the unnamed class members’ claims do not conflict. They all arise out of the same set of facts – Defendants’ alleged misrepresentations during the Class Period.”).

Applying those standards here, Littleton is plainly adequate to represent the Class: he sustained losses as a result of the same alleged material misrepresentations as other Class members, and his interest in obtaining the maximum possible recovery is coextensive with the interests of other Class members. Further, no conflicts of interest exist between Littleton and absent Class members, as all interests are aligned in establishing the same legal theories and factual allegations.⁵

Additionally, Littleton has retained qualified and capable counsel in Levi & Korsinsky,

⁵ The fact that Littleton seeks to represent investors in different types of securities does not change the outcome on this issue. While class members purchased and/or sold different securities at different times, the Class as a whole sustained damage as a result of Musk’s and Tesla’s false statements about taking Tesla private. Thus, the class as a whole must prove the same elements for purposes of establishing liability and damages. Classes comprised of differing securities do not create intra-class conflicts as a matter of law and, consequently, do not require specialized class representation. *See, e.g., In re Snap Inc. Sec. Litig.*, 334 F.R.D. 209, 218-19 (C.D. Cal. 2019) (certifying representative to oversee class consisting of investors with claims under Securities Act of 1933 and Securities Exchange Act of 1934); *Pirnik v. Fiat Chrysler Autos., N.V.*, 327 F.R.D. 38, 48-49 (S.D.N.Y. 2018) (rejecting argument concerning “intra-class conflict” where claims involved different misrepresentations, time periods, and corrective disclosures); *Basile v. Valeant Pharm. Int’l, Inc.*, No. SACV142004DOCKES, 2017 WL 3641591, at *7 (C.D. Cal. Mar. 15, 2017) (certification appropriate where “countervailing interests regarding the level of price inflation at any given time” are “substantially outweighed by the class members’ common interests” (internal quotations omitted)); *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 109 (S.D.N.Y. 2007) (rejecting intra-class conflict arguments that “small differences in returns experienced by holders of ADSs and ordinary shares may affect the amount of damage but are unlikely to alter the methodologies of calculation, at least to a degree necessary to warrant, at this juncture, the creation of subclasses”).

LLP. Levi & Korsinsky is one of the most experienced securities class action firms in the United States and has a proven track record of success in complex securities cases such as this one. *See* Firm Resume attached as Exhibit A to the accompanying Declaration of Nicholas I. Porritt. Moreover, Levi & Korsinsky has vigorously prosecuted the proposed Class's claims to date by, *inter alia*: investigating and researching the proposed Class's potential claims; defeating Defendants' motion to dismiss; and propounding significant written discovery. Porritt Decl. at ¶¶2-5. Thus, Littleton satisfies the adequacy requirements of Rule 23(a)(4) and should be appointed as Class Representative.

D. The Requirements of Rule 23(b) Are Satisfied.

In addition to meeting the requirements of Rule 23(a), the proposed Class satisfies the two requirements under Rule 23(b)(3) that: (a) "questions of law or fact common to class members predominate over any questions affecting only individual members," and (b) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

1. Common Questions of Law and Fact Predominate

Predominance is a test "readily met" in securities fraud cases like this one. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). The "predominance" inquiry focuses on the relationship between the common and individual issues. *Las Vegas Sands, Inc.*, 244 F.3d at 1162; *LDK Solar*, 255 F.R.D. at 525. Rule 23(b)(3) does not require that every question of fact or law amongst the class be identical; it only requires that the common questions predominate over individual questions. Where, as here, common questions represent a significant aspect of the case and can be resolved for all members of the class in a single adjudication, class certification is justified. *See, e.g., In re Diamond Foods, Inc.*, 295 F.R.D. 240, 246 (N.D. Cal. 2013); *Hanlon*, 150 F.3d at 1022; *LDK Solar*, 255 F.R.D. at 525-26. Indeed, as the Ninth Circuit observed:

[Rule 23] "does not require that all the members of the class be identically situated, if there are substantial questions either of law or fact common to all." [Rule 23] is based on the assumption that the economy of time, effort, and expense which will result from a common trial of substantial common issues exceeds the additional burden which may be imposed upon the court and the parties by the necessity of also determining in the common litigation those issues which may be several.

Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 914-15 (9th Cir. 1964) (citation

omitted, footnote omitted); *accord Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975).

The elements of the underlying causes of action strongly influence whether common issues predominate. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 810 (2011) (*Halliburton I*). Here, Littleton seeks certification of the putative Class to pursue claims under §§10(b) and 20(a) of the Exchange Act. The elements of a §10(b) claim are: “(1) a material misrepresentation or omission by the defendant[s]; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.” *Amgen*, 568 U.S. at 460-61. §20(a) creates liability for control persons of violators of §10(b). There can be no dispute that falsity, scienter, materiality, loss causation, and control are issues common to the Class because “failure of proof” on any of these elements “would end the case” for all Class members. *See Amgen*, 568 U.S. at 467-68. Thus, “materiality is a ‘common questio[n]’ for purposes of Rule 23(b)(3)”. *Id.* Similarly, “this Court has held that loss causation and the falsity or misleading nature of the defendant’s alleged statements or omissions are common questions that need not be adjudicated before a class is certified”. *Id.* at 475; *see also Halliburton I*, 563 U.S. at 813 (holding plaintiff need not prove loss causation at class certification).

Thus, common issues predominate as the Complaint alleges a “common course of conduct” of misrepresentations that affect all members of the proposed Class in the same manner. *See LDK Solar*, 255 F.R.D. at 530 (“all class members are unified by an interest in proving the same common course of conduct regarding LDK’s allegedly fraudulent inventory representations. Common issues concerning that fundamental course of conduct predominate over any individual incentives particular class members may have to maximize their damages.”); *see also Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 640 (C.D. Cal. 2009) (“[i]n summary, the critical questions of what Defendants said, what they knew, what they may have withheld, and with what intent they acted, are central to all class members’ claims. Without favorable findings on these critical questions related to liability, no member of the class can succeed.”).

2. No Individual Issues of Reliance Preclude Certification

The element of reliance for the §10(b) claims also does not create any individualized

1 issues because Littleton and other Class members are entitled to a presumption of reliance under
 2 the “fraud on the market” theory established by *Basic, Inc. v. Levinson*, 485 U.S. 224, 247 (1988).
 3 “District courts in the Ninth Circuit have held that when plaintiffs plead a fraud-on-the-market
 4 theory, questions of whether misleading conduct occurred, and whether that conduct occurred
 5 with fraudulent intent, predominate over other questions.” *Cooper Cos.*, 254 F.R.D. at 639. The
 6 fraud-on-the-market presumption of reliance depends on the theory that, in an efficient market,
 7 all information, including any misrepresentation, is incorporated into the price of a security, and
 8 investors therefore rely on the misrepresentation when purchasing a security at the market price.
 9 *Basic*, 485 U.S. at 247; *see also LDK Solar*, 255 F.R.D. at 526 (“[w]ithout the presumption, class
 10 certification would be virtually impossible as individual questions regarding reliance would
 11 predominate over common questions.”). Thus, this issue turns on whether the market for Tesla’s
 12 securities was efficient.

13 Courts in this Circuit look to the so-called *Cammer* factors to assess market efficiency.
 14 *Diamond Foods*, 295 F.R.D. at 247 (quoting *Cammer v. Bloom*, 711 F. Supp. 1264, 1286-87
 15 (D.N.J. 1989)). The *Cammer* factors include: (1) whether the stock trades at a high weekly
 16 volume; (2) whether securities analysts follow and report on the stock; (3) whether the stock has
 17 market makers and arbitrageurs; (4) whether the company is eligible to file SEC registration form
 18 S-3, as opposed to form S-1 or S-2; and (5) whether there are empirical facts showing a cause and
 19 effect relationship between unexpected corporate events or financial releases and an immediate
 20 response in the stock price. In addition, courts often have regard to the additional *Krogman*
 21 factors, which include: (1) the company’s market capitalization; (2) the bid-ask spread for stock
 22 sales; and (3) float, the stock’s trading volume without counting insider-owned stock. *Krogman*
 23 *v. Sterritt*, 202 F.R.D. 467, 477-78 (N.D. Tex. 2001).

24 Based on a thorough analysis of these well-established factors, Plaintiff’s expert, Dr.
 25 Michael Hartzmark, opines that the market for Tesla’s securities traded in an open, developed,
 26 and efficient market during the Class Period. Dr. Hartzmark’s report containing his opinions and
 27 their basis is attached as Exhibit A to his Declaration, filed with this motion. Dr. Hartzmark’s
 28 opinions are well-founded and should be accepted by the Court.

a. Tesla's common stock traded in an open, developed, and efficient market during the Class Period

As an initial matter, Tesla's common stock traded on the NASDAQ, which courts have held is presumptively an efficient market. *Diamond Foods*, 295 F.R.D. at 250 ("Nor has defendant identified any authority, binding or otherwise, that has held that common shares traded on the NASDAQ are not traded in an efficient market."). A review of the *Cammer* and *Krogman* factors confirms this conclusion.

Cammer I – Weekly Trading Volume: As the court stated in *Cammer*, "[t]urnover measured by average weekly trading of two percent or more of the outstanding shares would justify a strong presumption that the market for the security is an efficient one; one percent would justify a substantial presumption." *Cammer*, 711 F. Supp. at 1286. Tesla shares had a ratio of average weekly trading volume to shares outstanding of **42%** (including 54% for the week of August 6, 2018 – August 10, 2018, and 30% for the week of August 13, 2018 – August 17, 2018), which is significantly above *Cammer*'s 2% threshold. Hartzmark Report. at ¶26; *see Cammer*, 711 F. Supp. at 1293 (discussing 2% threshold). For comparison purposes, Tesla's turnover during the Class Period would have placed it in the top 5% of all the NYSE and NASDAQ-traded companies. *Id.* This supports a "strong presumption" that the market for Tesla common stock was efficient. *Id.* ¶27; *see, e.g., City of Ann Arbor Emps.' Ret. Sys. v. Sonoco Prods. Co.*, 270 F.R.D. 247, 256 (S.D. Cal. 2010) (finding a stock with a weekly trading volume of 2.61% to have traded in an efficient market); *Hayes v. MagnaChip Semiconductor Corp.*, No. 14-CV-01160-JST, 2016 WL 7406418, at *5 (N.D. Cal. Dec. 22, 2016) (finding 4.2% weekly share trading volume as "favor[ing] a finding of market efficiency" as it was "double the 2% that Cammer stated would justify a strong presumption of market efficiency.").

Cammer II – Analyst Coverage: During the Class Period, between 32 and 33 research analysts followed Tesla and 15 additional technical or analyst firms covered Tesla and reported results. Hartzmark Report at ¶29. This is more than sufficient to satisfy *Cammer* II. *See, e.g., In re Nature's Sunshine Prod.'s Inc. Sec. Litig.*, 251 F.R.D. 656, 663 (D. Utah 2008) (four analysts sufficient); *In re Juniper Networks, Inc. Sec. Litig.*, 264 F.R.D. 584, 591 (N.D. Cal. 2009) (same).

Cammer III – Market Makers & Arbitrageurs: Market makers and arbitrageurs, as stated by the *Cammer* court, help ensure that news and reported financial results are reflected in the price of a company’s stock. *See Cammer*, 711 F. Supp. at 1286-87. Thus, the existence of market makers and arbitrageurs in the market of a company’s stock supports a finding of market efficiency. Here, Tesla stock was traded on NASDAQ, was actively traded by a large group of sophisticated institutional investors, and there were opportunities for arbitrage in Tesla’s stock. Hartzmark Report at ¶36.

As Dr. Hartzmark explains, the issue of arbitrage opportunities can be analyzed by considering whether there is an availability of shares to borrow in order to enter into a short sale. *Id.* ¶44. Here, Dr. Hartzmark found that Tesla’s short interest ranged from 34.99 million shares to 32.72 million shares during the Class Period. *Id.* ¶45. This relatively elastic supply and demand suggests that arbitrageurs and traders with negative views on Tesla were able to actively trade. This evidence of market makers and arbitrage opportunities in the market for Tesla common stock is further proof that Tesla traded in an efficient market throughout the Class Period.

Cammer IV – Form S-3 Eligibility: To be eligible to register on Form S-3, an issuer must (a) be current in its SEC filings for at least 12 months; and (b) have a public float of \$75 million – factors that Tesla easily satisfied throughout the Class Period. In fact, Tesla has filed a Form S-3 six times since it became public in 2010, including both before and after the Class Period. *Id.* ¶47. Tesla’s common stock therefore indisputably satisfies the fourth *Cammer* factor, yet another indication that it traded in an efficient market.

Cammer V – Price Impact of Corporate Statements: The *Cammer* court stated that “[o]ne of the most convincing ways to demonstrate [market] efficiency would be to illustrate, over time, a cause and effect relationship between company disclosures and resulting movements in stock price.”⁶ *Cammer*, 711 F. Supp. at 1291. This factor requires “empirical facts showing a

⁶ Courts, including several in this Circuit, have found that the fifth *Cammer* factor is not required where the other *Cammer* and *Krogman* factors weigh in favor of market efficiency. *Angley v. UTi Worldwide Inc.*, 311 F. Supp. 3d 1117, 1121 (C.D. Cal. 2018) (“Because there is no evidence disputing the first four *Cammer* factors and the *Krogman* factors weigh in favor of market efficiency, the Court finds Plaintiff has met its burden of showing market efficiency”); *see also*

1 cause and effect relationship between unexpected corporate events or financial releases and an
 2 immediate response in the stock price.” *Hayes*, 2016 WL 7406418, at *6 (internal quotations
 3 omitted). “Event studies are by far the most common test for a causal connection.” *Petrie v. Elec.*
 4 *Game Card, Inc.*, 308 F.R.D. 336, 352 (C.D. Cal. 2015).

5 Dr. Hartzmark performed a robust event study and concluded that Tesla common stock
 6 exhibits the type of cause and effect relationship described in *Cammer*. As detailed in his report,
 7 Dr. Hartzmark concluded that the price of Tesla stock reacted quickly to the release of new
 8 company-specific “unexpected” news. Specifically, Dr. Hartzmark’s analysis shows that on
 9 August 7, 2018, at 12:17 p.m. EDT, Tesla’s stock price rose swiftly from \$342.26 to \$354.38 in
 10 response to the *Financial Times* reporting that a fund from Saudi Arabia was investing a large
 11 amount in Tesla. Hartzmark Report at ¶74. These price movements demonstrated with “99%
 12 confidence” that the information reported by the *Financial Times* caused a “rapid response” and
 13 strongly supports the conclusion that Tesla common stock “trades in an open, well-developed and
 14 efficient market.” *Id.* ¶74 & n.115; *see also id.* ¶76.

15 Tesla’s stock price also reacted immediately to Elon Musk’s tweet at 12:48 p.m. EDT.
 16 From \$356.85 per share at 12:47 p.m. EDT, Tesla’s stock increased by 2.29% within the first
 17 minute of trading (*i.e.*, 12:48 p.m. to 12:49 p.m.). *Id.* ¶75 & n.117. Tesla’s stock price continued
 18 to increase before closing at \$379.57. *See id.* ¶75. This immediate reaction to Elon Musk’s tweets
 19 on August 7, 2018 is strong evidence for market efficiency. *Id.* ¶76.

20 Similarly, on August 17, 2017, Tesla’s stock price declined “rapidly” in response to the
 21 article published by *The New York Times*, which reported on an interview with Elon Musk where
 22 he indicated that funding had never been “secured” and that a going-private transaction was not
 23 “imminent.” *Id.* ¶77. From the previous day’s closing price, Tesla’s common stock price declined
 24 from \$335.45 per share on August 16, 2018 to a closing price of \$305.50 on August 17, 2018. *Id.*
 25 The “rapid price response” of Tesla’s stock further supports the conclusion that Tesla’s stock
 26 traded in “an open, well-developed and efficient market.” *Id.* ¶¶79-80.

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Vinh Nguyen v. Radiant Pharm. Corp., 287 F.R.D. 563, 574 (C.D. Cal. 2012) (“This Court recognizes that *Cammer* factors are ‘an analytical tool, not a checklist’ of requirements.”).

Dr. Hartzmark also analyzed the relationship between Tesla stock returns on days when it announced earnings news versus trading days with no news, specifically Tesla's announcement of financial results on May 2, 2018 and August 1, 2018. *Id.* ¶¶68, 69. He concluded that Tesla-specific information and large price movements in Tesla's stock price were related. *Id.* ¶¶68, 69. Dr. Hartzmark further tested this cause-and-effect relationship by employing a statistical analysis for autocorrelation, which concerns whether an observer can use the return from yesterday to predict with the same level of certainty the return of today. *Id.* ¶¶87-89. He determined that there was no statistically significant autocorrelation of Tesla abnormal returns. *Id.* ¶90. The lack of autocorrelation is consistent with market efficiency. *In re Gaming Lottery Sec. Litig.*, No. 96 CIV 5567 RPP, 2001 WL 204219, at *17 (S.D.N.Y. Mar. 1, 2001) (market efficiency found where stock "did not exhibit autocorrelation.").

Krogman 1 – Market Capitalization: The *Krogman* court reasoned that higher market capitalization is indicative of market efficiency because "there is a greater incentive for stock purchasers to invest in more highly capitalized corporations." *Krogman*, 202 F.R.D. at 478. Throughout the Class Period, Tesla's market capitalization averaged approximately \$59.55 billion, placing it in the 95th percentile of other common stocks listed on the NYSE or NASDAQ. Hartzmark Report at ¶¶51-52. This factor is therefore satisfied.

Krogman 2 – Bid-Ask Spread: The *Krogman* court stated that "[a] large bid-ask spread is indicative of an inefficient market, because it suggests that the stock is too expensive to trade." *Krogman*, 202 F.R.D. at 478. The average daily percent spread for Tesla common stock during the Class Period was 0.02%. Hartzmark Report at ¶¶56. Such a spread compares favorably to cases where courts have concluded that common stocks traded in efficient markets. *See, e.g., Radient Pharm. Corp.*, 287 F.R.D. at 574 (bid-ask spread of 0.58 percent supported market efficiency); *In re Scientific-Atlanta, Inc. Sec. Litig.*, 571 F. Supp. 2d 1315, 1339 (N.D. Ga. 2007) (bid-ask spread that "never exceeded 1.9%" weighed heavily in favor of market efficiency); *Cheney v. Cyberguard Corp.*, 213 F.R.D. 484, 501 (S.D. Fla. 2003) (average daily relative bid-ask spread of 2.44% weighed in favor of market efficiency). Moreover, between 2016 and 2018, Tesla's bid-ask spread was narrower than 90% of the common stocks on the NYSE and

1 NASDAQ. Hartzmark Report at ¶57.

2 **Krogman 3 – Public Float of Tesla Stock:** A large public float indicates that a large
3 proportion of shares are available to non-insiders, who can trade without restrictions and can
4 profit by trading on new information to the marketplace, further evidence of market efficiency.
5 *Id.* ¶53. Tesla’s public float was approximately 79.7% of its shares during the Class Period, further
6 evidence that Tesla common stock traded in an efficient market. *Id.* ¶54.

7 * * *

8 Thus, Tesla’s common stock satisfied each of the *Cammer* and *Krogman* factors during
9 the Class Period, which provides powerful evidence that it traded in an open, developed, and
10 efficient market. Because the market for Tesla common stock was efficient, a presumption of
11 reliance applies and common issues such as falsity, materiality, scienter, and loss causation
12 predominate over any individual issues. *Huberman v. Tag-It Pac. Inc.*, 314 F. App’x 59, 63 (9th
13 Cir. 2009) (“where Tag-It was traded on a national exchange and the stock prices reflected public
14 information an efficient market is present. Therefore, the fraud-on-the-market presumption
15 applies, eliminating the need for individual reliance by each class member. Common questions of
16 fact and law predominate over individual questions pursuant to Rule 23(b)(3).”); *In re Connetics*
17 *Corp. Sec. Litig.*, 257 F.R.D. 572, 579 (N.D. Cal. 2009) (“plaintiff has met its burden at this stage
18 in the litigation by demonstrating that it traded on an efficient market and is therefore entitled to
19 the presumption of reliance”).⁷

20 ⁷ The presumption of reliance applies to all purchasers of Tesla stock during the Class Period,
21 including investors purchasing Tesla stock to cover pre-existing short positions. *See Levy v.*
22 *Gutierrez*, 448 F. Supp. 3d 46, 60 (D.N.H. 2019) (market for options was efficient as the court
23 was “not persuaded that the classes of investors identified by Apple – short sellers, market-neutral
24 arbitrageurs, and options traders – categorially are indifferent to, or disregard whether, market
25 prices are distorted by fraud.”); *Tsirekidze v. Syntax-Brilliant Corp.*, No. CV-07-02204-PHX-
26 FJM, 2009 WL 2151838, at *6 (D. Ariz. July 17, 2009) (rejecting defendants’ argument that the
27 fraud-on-the market presumption did not apply to “nearly half of the putative class consist[ing]
28 of short-sellers and market makers” as “[s]hort-sellers and market makers depend on the market
to provide accurate information regarding a company and its prospects whether or not they rely
on the accuracy of a specific stock price or the prognosis for that price.”); *Levie v. Sears, Roebuck*
& *Co.*, 496 F. Supp. 2d 944, 949 (N.D. Ill. 2007) (finding “any [short sellers, day traders and
other option traders] who can establish injury as a result of the alleged fraud is properly included
in the class definition” because “[t]he fact that these traders have divergent motivations in

b. Tesla's option contracts traded in an open, developed, and efficient market during the Class Period

As an initial matter, “an option market is tied to the market of the underlying security, and thus where that security trades in an efficient market, the options are presumed to as well.” *Marcus v. J.C. Penney Co., Inc.*, No. 6:13-CV-736-MHS-KNM, 2016 WL 8604331, at *8 (E.D. Tex. Aug. 29, 2016), *report and recommendation adopted*, No. 6:13-CV-736, 2017 WL 907996 (E.D. Tex. Mar. 8, 2017). Accordingly, many courts have found that where a company’s common stock trades in an efficient market, it follows that the company’s option contracts also trade in an efficient market. *See, e.g., Marcus*, 2016 WL 8604331, at *9 (“an experts’ application of the *Cammer* factors to common stock was sufficient to trigger the presumption for options as well”); *McIntire v. China MediaExpress Holdings, Inc.*, 38 F. Supp. 3d 415, 434 (S.D.N.Y. 2014) (“The Court has found that the market for CCME stock was efficient and is not persuaded that there are any special circumstances that would preclude applying the fraud-on-the-market presumption to options traders”); *In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, No. CIV.A. 05-1151 SRC, 2013 WL 396117, at *12 (D.N.J. Jan. 30, 2013) (“insofar as the alleged Rule 10b–5 violations are predicated on put or call options transactions, the trading of Merck stock on the efficient NYSE suffices to establish that the options also traded on an efficient market.”); *In re HealthSouth Corp. Sec. Litig.*, 257 F.R.D. 260, 282 (N.D. Ala. 2009) (finding that “[b]ecause Stockholder Plaintiffs’ evidence establishes that HealthSouth common stock traded in an efficient market during the Class Period” that it “entitles them to invoke the presumption of reliance in support of all their claims under Rule 10b–5”); *In re Sci.-Atlanta, Inc. Sec. Litig.*, 571 F. Supp. 2d 1315, 1330 (N.D. Ga. 2007) (“In sum, therefore, where a put options seller demonstrates market efficiency in the underlying security, he is generally entitled to rely on the fraud on the market theory.”); *In re Enron Corp. Litig.*, 529 F.Supp.2d 644, 754 (S.D. Tex. 2006) (“The Court finds that Dr. Nye’s evidence applying the *Cammer/Unger/Bell* factors to the stock, is sufficient to trigger the fraud-on-the-market presumption for Plaintiffs’ § 10(b) claims

purchasing shares should not defeat the fraud-on-the-market presumption absent convincing proof that price paid no part whatsoever in their decision making.” (quoting *In re Bally Manufacturing Secs. Corp. Litig.*, 141 F.R.D. 262, 269 n. 6 (N.D.Ill.1992)).

1 based on the options.”).⁸

2 Accordingly, Dr. Hartzmark’s analysis of the efficiency of the market for Tesla’s common
3 stock would be sufficient for the Court to find that the market for Tesla’s option contracts on that
4 common stock was also efficient. Notwithstanding, Dr. Hartzmark has still undertaken an analysis
5 of the efficiency of the market for options on Tesla’s common stock by applying the *Cammer* and
6 *Krogman* factors (adapted as necessary). Based on this analysis, Dr. Hartzmark has concluded
7 that Tesla’s option contracts traded in an open, developed, and efficient market during the Class
8 Period.⁹

9 ***Cammer I – Weekly Trading Volume:*** Trading in Tesla options was very active during
10 the Class Period. Over the Class Period, there was a total volume of 1,772,360 call option
11 contracts (representing 177,236,000 underlying shares) and 1,598,370 put option contracts
12 (representing 159,837,000 underlying shares). Hartzmark Report at ¶112. Thus, the number of
13 shares represented by these contracts of 337,073,000 million shares is almost twice Tesla’s 170.6
14 million outstanding shares over the Class Period. *Id.* It represents average weekly turnover of
15 approximately 110% of the average outstanding shares. *Id.* Further, during the Class Period, the
16 maximum open interest summed across all Tesla options that traded was 886,084 call option
17 contracts (representing 88,608,400 underlying shares) and 1,464,106 summed across all put
18 option contracts (representing 146,410,600 underlying shares). *Id.* ¶113. This suggests an active
19 secondary market for Tesla’s option contracts. *Id.* This supports the conclusion that Tesla options
20 traded in efficient markets. *Id.* ¶114.

21 ⁸ This premise holds true for a company’s other securities, such as Tesla’s convertible bonds in
22 this case. *See, e.g., In re Cobalt Int’l Energy, Inc.*, No. CV H-14-3428, 2016 WL 215476, at *7
23 (S.D. Tex. Jan. 19, 2016) (“Because the bonds were convertible to common stock, and because
24 Plaintiffs adequately alleged that there was an efficient market for the common stock, Plaintiffs
25 have alleged sufficient facts on the reliance factor for their § 10(b) claim as to the bond
26 offerings.”); *Connetics Corp.*, 257 F.R.D. at 579 (“... lead plaintiff has put forward un rebutted
evidence that the market for Connetics common stock was efficient.”); *Chu v. Sabratek Corp.*,
100 F. Supp. 2d 815, 826 (N.D. Ill. 2000) (“Inasmuch as there existed an efficient market for
Sabratek common stock, this Court also concludes that an efficient market existed for Sabratek
convertible notes, which were convertible to Sabratek common stock.”).

27 ⁹ *Cammer* Factors II (analyst coverage), IV (S-3 eligibility) and *Krogman* Factors 1 (market
28 capitalization) and 3 (public float) apply identically to options as well as common stock. Each
supports market efficiency.

1 **Cammer III – Market Makers & Arbitrageurs:** Exchange-traded options, also known
 2 as “listed options,” are not traded on the NASDAQ Global Select Market, but are mostly traded
 3 on other domestic and international exchanges, with the primary exchange being the Cboe
 4 Options Exchange. *Id.* ¶108. Accordingly, should it be found that Tesla common stock traded in
 5 an efficient market, then that finding along with the fact that the Tesla options traded on a
 6 centralized exchange — that provides the same type of information rich environment and
 7 informational benefits to investors as those found for the NYSE and NASDAQ exchanges —
 8 supports the conclusion that the Tesla options traded in an efficient market. *Id.* ¶111.

9 **Cammer V – Price Impact of Corporate Statements:** Dr. Hartzmark performed a robust
 10 event study and put-call parity evaluation before concluding that Tesla options exhibit the type of
 11 cause and effect relationship described in *Cammer*. He first conducted a cause-and-effect test for
 12 price impact on individual options traded during the Class Period by examining the response of
 13 option prices after the statistically significant stock price movements on August 7, 2018 and
 14 August 17, 2018. *Id.* ¶138. This analysis relied on actual trades in options on Tesla common stock
 15 to determine whether the movements in the options prices were directionally consistent with the
 16 expected movement of the option based on the stock price movements alone and holding all other
 17 variables that affect option prices constant. *Id.* ¶142. In response to the *Financial Times* article
 18 issued on August 7, 2018 for the 671 option series that traded both before and after disclosure,
 19 which represented over 85% of the volume during the Class Period, that 96% of the option series
 20 moved in the expected direction. *Id.* ¶139. Likewise, for the August 17, 2018 *New York Times*
 21 article, 1,162 option series that traded in the pre- and post-period, representing over 94% of the
 22 total volume of all Tesla options during the Class Period, that over 95% of the option series moved
 23 in the direction one would expect upon a drop in Tesla’s common stock when holding all other
 24 option pricing inputs constant. *Id.* ¶140. Accordingly, this factor also strongly weighs in favor of
 25 market efficiency.

26 In response to Elon Musk’s August 7, 2018 tweet, Dr. Hartzmark found that for the 867
 27 series that traded both in the pre- and post-period, which represented almost 90% of the total
 28 volume of all options traded during the Class Period, that 77% of the option series price

1 movements moved in the direction expected. *Id.* ¶141. Further, for the remaining 23% moving in
 2 the opposite direction, the movements coincided with reasonable investor expectations believing
 3 that it was less probable that Tesla’s stock price would exceed the strike of the option prior to the
 4 stated maturity of these option series. *Id.* ¶142. As a result, the impact on the volatility of Tesla
 5 common stock along with the magnitude of such impact caused the option series prices to move
 6 in a direction opposite to the increase in Tesla’s common stock price. *Id.* ¶142. Accordingly,
 7 option pricing in response to Elon Musk’s tweet weighs in favor of market efficiency. *Id.* ¶143.

8 Dr. Hartzmark also conducted an empirical test to determine whether Tesla common stock
 9 and exchange-traded options on Tesla common stock violated the put-call parity condition for
 10 each minute interval of the Cboe Dataset during the Class Period. *Id.* ¶¶128-29. Dr. Hartzmark
 11 found that the put-call parity relation held for 80% of the call option pairs and for 76.2% of the
 12 put options pairs. *Id.* ¶131. Notably, Dr. Hartzmark found that the violations of the put-call parity
 13 amounted to an average of 0.27% of the mid-point of Tesla’s common stock’s bid and ask price
 14 for the call option-based pairs and 0.28% for the put option-based pairs. *Id.* ¶132. The direction
 15 of the violations indicates that the cost to borrow Tesla common stock to enter a short stock
 16 position was higher than normal. *Id.* Thus, Dr. Hartzmark concluded that when taking into account
 17 the reported stock borrowing costs and the costs to enter the positions, which the put-call parity
 18 relationship does not account for, that the average violation of 0.28%, or \$0.98 of Tesla’s common
 19 stock average closing price during the Class Period, “is not indicative of unexploited arbitrage
 20 opportunities or of an inefficient market, but simply reflects the relatively higher costs of shorting
 21 the stock.” *Id.* ¶133. This finding shows that the market for options on Tesla common stock was
 22 efficient.

23 **Krogman 2 – Bid-Ask Spread:** The *Krogman* court stated that “[a] large bid-ask spread
 24 is indicative of an inefficient market, because it suggests that the stock is too expensive to trade.”
 25 *Krogman*, 202 F.R.D. at 478. The average daily percent spread for Tesla options during the Class
 26 Period was 0.55% for call options and 0.45% for put option. Hartzmark Report at ¶115. Dr.
 27 Hartzmark’s analysis of individual options similarly showed that Tesla’s options’ bid-ask spreads
 28 during the Class Period ranged between the 50th and 75th percentiles of NYSE- and NASDAQ-

1 traded companies. *Id.* ¶121. These analyses support the conclusion that Tesla options traded in
 2 efficient markets. *Id.* ¶151.

3 * * *

4 Thus, Tesla’s option contracts also satisfy each of the *Cammer* and *Krogman* factors
 5 during the Class Period, which provides powerful evidence that they traded in an open, developed,
 6 and efficient market. Accordingly, purchasers and sellers of Tesla option contracts during the
 7 Class period are also entitled to a presumption of reliance. *See Levie*, 496 F. Supp. 2d at 949
 8 (“traders in put and call options rely on the integrity of information disseminated in the market
 9 just as do purchasers and sellers of the underlying security . . . any such trader who can establish
 10 injury as a result of the alleged fraud is properly included in the class definition”); *Deutschman*
 11 *v. Beneficial Corp.*, 132 F.R.D. 359, 370 (D. Del. 1990) (finding “purchaser of call options can
 12 be presumed to rely on the market price and, consequently, can invoke the fraud on the market
 13 presumptions” despite claims by defendants that call option purchasers are “‘speculators’ who do
 14 not rely on the integrity of the market price.”).

15 3. Damages May Be Calculated Using a Common Methodology.

16 For a class certified under Rule 23(b)(3) a plaintiff must show that “damages are capable
 17 of measurement on a classwide basis” and tie their damages model to their theory of liability.
 18 *Comcast Corp. v. Behrend*, 569 U.S. 27, 34-35 (2013). Under Ninth Circuit law, “differences in
 19 damages calculations” cannot defeat class certification. *See, e.g., Pulaski & Middleman, LLC v.*
 20 *Google, Inc.*, 802 F.3d 979, 986-88 (9th Cir. 2015) (holding that district court erred in denying
 21 class certification based on a misreading of *Comcast* and confirming that individualized “damage
 22 calculation alone cannot defeat class certification.”); *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161,
 23 1168 (9th Cir. 2014) (“So long as the plaintiffs were harmed by the same conduct, disparities in
 24 how or by how much they were harmed did not defeat class certification.”). As the Ninth Circuit
 25 explained in its seminal *Blackie* decision: “[t]he amount of damages is invariably an individual
 26 question and does not defeat class action treatment” because “should the class prevail[,] the
 27 amount of price inflation during the period can be charted and the process of computing individual
 28 damages ***will be virtually a mechanical task.***” 524 F.2d at 905 (emphasis added).

Here, Class members' damages can be calculated using a common methodology, their out of pocket loss, that applies uniformly to all Class members. Moreover, these common damages methodologies are consistent with Littleton's and the Class's theory of liability – namely, that Elon Musk and Tesla deceived the market about taking Tesla private. Misrepresentations by Elon Musk and Tesla artificially inflated Tesla's stock price and distorted the prices of stock options, artificially inflating the prices of some stock options and artificially deflating the price of others. As Dr. Hartzmark's report explains, damages arising from the purchase of Tesla common stock (including purchases to cover "short" transactions) can be uniformly calculated with the standard "out-of-pocket" damages methodology. Hartzmark Report at ¶159. The out-of-pocket methodology utilizes a simple formulaic way of calculating losses based on the difference between the actual prices paid for or received on that day for a specific Tesla security and the true or "but-for" values of the security absent the alleged misrepresentations and omissions. *Id.* ¶161. To calculate these "but-for" values for the common stock in this action, Littleton's damages expert could construct an "inflation ribbon" based on an event study like the one Dr. Hartzmark uses in his report that measures the inflation in the price of Tesla's common stock caused by Elon Musk's tweets on August 7, 2018. *Id.* ¶¶166-68. While individual damages for each Class member need to be calculated based on each members' actual stock trading activity (*e.g.*, purchases or sales, trade dates, trading prices, and number of shares traded), this is a purely mechanical and formulaic exercise using readily available daily pricing information. *Id.* ¶175.

Likewise, the amount of inflation or deflation of an option price can be calculated by using an options pricing model, such as the Black-Scholes option pricing model, and inputting the "but-for" stock price and the "but-for" implied volatility level for each day. *Id.* ¶¶170-72. Class member option damages would be equal to the difference between the price paid or received and the "but-for" price which may indicate either artificial inflation or deflation. As such, the individual damages for each Class member can be calculated based on their actual option trading activity (*e.g.*, purchases or sales, trade dates, trading prices, and number of options traded), which would be a purely mechanical and formulaic exercise using readily available daily pricing information. *Id.* ¶174. Thus, like the "out-of-pocket" method, this method would be formulaic

1 and applied class-wide. *Id.* ¶175. *See also Marcus*, 2016 WL 8604331, at *10 (accepting “but-
 2 for” damages model over objection from defendants because, while “Defendants may disagree
 3 with the methodology or feel that another methodology is correct,” it did not make the plaintiffs’
 4 “methodology inconsistent with [their] theory of liability”).

5 In sum, the out-of-pocket damages calculations for both stock and options flow readily
 6 from the “actions that created the legal liability” and therefore individual damages issues do not
 7 predominate over common liability issues. *See Leyva v. Medline Indus.*, 716 F.3d 510, 513-14
 8 (9th Cir. 2013) (“In this circuit, however, damage calculations alone cannot defeat certification”
 9 (quoting *Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010))). For
 10 example, in *Hayes v. MagnaChip Semiconductor Corp.*, *supra*, the plaintiffs sought to certify one
 11 global class that encompassed investors suing under Sections 10(b) and 20A alleging different
 12 corrective disclosures and pursuing different damages. The plaintiffs adequately showed
 13 predominance under *Comcast*. The court held that “[l]ike in *Hatamian*, [plaintiff’s expert’s]
 14 event study, if reliable, should suffice to show how damages could be calculated.” 2016 WL
 15 7406418, at *9 (citing *Hatamian v. Advanced Micro Devices, Inc.*, No. 14-CV-00226 YGR, 2016
 16 WL 1042502, at *8–9 (N.D. Cal. Mar. 16, 2016)). Issues pertaining to the “fit” of the “damages
 17 methodology” to the theory of the case related to loss causation, a common issue, given that the
 18 plaintiffs asserted only “one theory” of fraud. *Id.*; *see also Snap*, 334 F.R.D. at 216-17 (granting
 19 certification where damages models “[sought] to measure only ‘damages attributable to
 20 [plaintiff’s] theory’—meaning a misstatement or omission in Snap’s registration statement
 21 To the extent that Defendant’s arguments seek to challenge [plaintiff’s expert’s] ability in practice
 22 to adjust for the confounding factors that may prevent isolation of price movement based on the
 23 alleged partial corrective disclosures, this is an inquiry to consider at the merits stage.”). Similarly,
 24 in *LDK Solar*, “potentially conflicting incentives regarding the calculation of damages do not
 25 preclude certification of the proposed class” because “‘risky’ trading strategies—margin trading
 26 and options transactions—adds little to the inquiry” as the “mere fact that plaintiff may have
 27 suffered even greater financial losses than other class members in response to a particular change
 28 in the stock’s price does not render his interests adverse to the remainder of the class.” 255 F.R.D.

at 533; *see also Cooper v. Thoratec Corp.*, No. 14-CV-0360 CW, 2018 WL 2117337, at *6-7 (N.D. Cal. May 8, 2018) (granting certification of single proposed class where plaintiffs “sufficiently show[ed], at this stage, that damages are capable of measurement on a classwide basis” even though misrepresentations changed over course of the class period).

4. *Class Treatment is Superior to Other Methods of Adjudication*

Rule 23(b)(3) requires that the class action device be “superior to other available methods for fairly and efficiently adjudicating the controversy.” FED. R. CIV. P. 23(b)(3). Courts consider four factors to determine superiority: “(1) the class members’ interests in individually controlling a separate action; (2) the extent and nature of litigation concerning the controversy already begun by or against class members; (3) the desirability of concentrating the litigation in the particular forum; and (4) the manageability of a class action.” *Juniper Networks*, 264 F.R.D. at 592. These factors are satisfied in this case.

First, the number of class members is too numerous, and the typical claim is too small for each individual class member to maintain a separate action. *See Siemers v. Wells Fargo & Co.*, 243 F.R.D. 369, 376 (N.D. Cal. 2007) (“The amounts involved are modest per investor. No single investor could hope to recover more than it would cost to prosecute an individual suit.”). Indeed, the likely modest size of most individual recoveries balanced against the significant resources necessary to prosecute this action against well-financed defendants, the “[e]conomic reality dictates that [this] suit proceed as a class action or not at all.” *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 161 (1974); *see also In re Micron Techs. Inc. Sec. Litig.*, 247 F.R.D. 627, 635 (D. Idaho 2007) (“If this action was not certified as a class, each plaintiff would have to establish the same fraudulent scheme. This repetitive process would ‘unnecessarily burden the judiciary.’”).

With respect to the second factor, Littleton is unaware of any other class action brought on behalf of Tesla investors that seeks recovery under the federal securities laws for the damages caused by Defendants’ fraud. Consequently, multiplicity of suits and the risk of inconsistent adjudications is not an issue here.¹⁰

¹⁰ The related derivative actions (*Laborers’ District Council Contractors’ Pension Fund of Ohio v. Musk*, C.A. No. 2019-0187-JRS; *Elton v. Musk*, 2018-0749-JRS; *Seidman v. Musk*, No. 2018-

1 Regarding the third factor, as in *Siemers*, “it seems undisputed that this venue, being the
2 home of [Tesla], is a desirable and convenient place to concentrate the litigation, no other venue
3 having been suggested.” *Siemers*, 243 F.R.D. at 376.

4 Finally, on the fourth factor, this action, like numerous other securities actions, presents
5 no management difficulties that would preclude it from being maintained as a class action. The
6 proposed Class is ascertainable because membership is based on objective criteria, *i.e.*, the dates
7 that investors purchased or sold Tesla’s publicly-traded securities, and putative Class members
8 can be easily identified through stock holder records.

9 In sum, class certification promotes judicial efficiency by permitting common claims and
10 issues to be tried only once with a binding effect on all parties. *See, e.g., Juniper Networks*, 264
11 F.R.D. at 592 (“Where thousands of identical complaints would have to be filed, it is superior to
12 concentrate claims through a class action in a single forum.”). The superiority requirement is met
13 here.

14 **E. Levi & Korsinsky Should be Appointed Class Counsel**

15 Littleton also respectfully requests that the Court appoint Levi & Korsinsky as Class
16 Counsel. In appointing class counsel, the Court must take into account: (i) the work counsel has
17 done; (ii) counsel’s experience in handling *inter alia* class actions and the types of claims asserted;
18 (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit
19 to representing the class. FED. R. CIV. P. 23(g)(1)(A). Here, these considerations weigh heavily in
20 favor of appointing Levi & Korsinsky as Class Counsel. The firm is among the most experienced
21 securities class action firms in the nation and has prosecuted numerous successful securities class
22 actions. *See* Porritt Decl., Exhibit A. Under Littleton’s supervision and direction, Levi &
23 Korsinsky has already undertaken a vigorous prosecution of this case, including by, among other
24 things: thoroughly analyzing, researching and investigating the securities law claims at issue;
25 drafting a detailed Consolidated Complaint; opposing Defendants’ motions to dismiss; begun

26 _____
27 0775-JRS; *Krol v. Musk*, 2018-0802-JRS; *Dixon v. Musk*, 2018-0806-JRS; *Doris Shenwick Trust*
28 *v. Musk*, 2018-0823-JRS; and *In re Tesla, Inc. S’holder Deriv. Litig.*, 1:18-cv-01669-CFC (D.
Del.) (consolidating two actions)), brought on behalf and for the benefit of Tesla, are currently
stayed.

pursuing discovery from Defendants and other third parties; and retained a market efficiency expert, Dr. Hartzmark, whose expert report is submitted with this Motion. Porritt Decl. at ¶¶2-5. Finally, Levi & Korsinsky will commit the necessary resources to achieve a successful recovery for investors. *Id.* at ¶7.

VI. CONCLUSION

For the foregoing reasons, Littleton respectfully requests entry of an order certifying this action as a class action pursuant to Federal Rule 23, appointing Littleton as Class Representative, and appointing Levi & Korsinsky as Class Counsel.

Dated: September 22, 2020

Respectfully submitted,

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